APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JANUARY SESSION, 1999

FILED

February 5, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**No. 02C01-9801-CC-00012**
Appellee	)	
	)	**MADISON COUNTY**
vs.	)	
	)	**Hon. FRANKLIN MURCHISON, Judge**
FARRIS GENNER MORRIS, JR.	)	
	)	
Appellant	)	**CAPITAL CASE**
	)	**(Premeditated First Degree Murder,**
	)	**Two Counts; Aggravated Rape)**

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OPINION FILED: _____

AFFIRMED

David G. Hayes

Judge

OPINION

(Deleted Summary of Testimony)

Background

A. Guilt/Innocence Phase

. . . .

. . . During this interview, the appellant made the following statement:

On September 16, 1994, I got off of work at 1:00 [p.m.]. I bought $250 worth of cocaine during the evening. I made several purchases. I smoked the whole $250 worth up.

Around 1:00 a.m. on September the 17th, 1994, I was sitting on my porch at 120 Ridgemont. My next door neighbor rode up with someone. He got out and came to the duplex. I asked him what was up. I asked dude, 'Why don't you sell me something?' He said he didn't sell dope. I asked him why he would walk out of his house every day and not speak to me, why he didn't show me any respect? He said he didn't have to listen to me and that he was going in his house and going to bed. I told him he was going to regret disrespecting me.

I went into my house. I knew that his wife wasn't at home yet. I knew that she would come in sooner or later. I got my shotgun from my bedroom. I loaded two shells into it. I sat in my living room waiting to hear her pull up.

I heard his wife and someone else pull up, but I missed them. They went in the house and locked the door behind them, I assumed.

I heard someone go out to the car. I looked out and it was his wife. When she opened the door, I got behind her with the shotgun. I pointed it at her and walked in behind her. A young girl was on the couch. I told her to get up. I told them to walk on back to the bedroom. They went into the bedroom and got onto the bed. The girl's husband was lying on the bed. I told him to give me the dope. He said he didn't have any. I fired the shotgun into the floor. He rolled off the bed. I asked him again for the dope. He said he didn't have any. He asked me if I wanted money. I told him, 'No, I don't want your money.'

I picked a pillow up off of the bed and put it over the barrel of the shotgun and I shot him. The girls were on the bed under a blanket or something. I tried to

put the young girl in the closet. She started acting crazy. We were in the hallway. She picked up a knife from somewhere. We struggled from the hallway into the front room. We wrestled on the couch. I took the knife from her. I laid the shotgun on the couch. I stabbed her down low with the knife. I hit her with my hand. I think I broke my finger. I can't raise it back up.

Before the struggle with the young girl, I had put her in the hall closet. I took the dude's wife into the other bedroom. I had her tied down on the big bed to the right as you walk into the bedroom. I used a black belt and some type of material to tie her hands and feet. It was dark in the room.

I went to the closet and got the young girl out. That's when she started to struggle and acting crazy, as I explained earlier. My intentions for getting her out of the closet was to tie her up, but she got to struggling and got the knife. After I stabbed her and she was lying there on the couch, I went and got a blanket that was already in the living room. I covered the young girl up. The dude's wife didn't want to see her.

I went into the bedroom and untied the other girl and we talked. We talked in the bedroom for a while. I told her I wanted to take a bath. We went into the bathroom. I undressed by taking off my pants and shirt. . . . I got in the tub and I told her to take my shorts off of me. She did. She gave me a bath. I held a gun in my hand.

We went back to the bedroom. I dried off with a sheet. I asked her if she had anything to eat. She fixed me a sandwich and Kool-Aid. I ate and then I laid the shotgun on the other bed and we had sex. We had sex three or four times. She gave me oral sex. I took the mattress off the other bed and put it up against the window because of the light coming through. She didn't act afraid.

About 6 or 7 this morning I told her I was going to let her go. I told her not to try and make a story up, just do what she was supposed to do.

I put my clothes in a plastic bag and took them home. I put the bag in the trash can in the bedroom where my dope was. I put the shotgun up under the chest of drawers in my bedroom.

(Deleted B. Penalty Phase)

I. Motion to Suppress

Nine hours after his arrest on September 17, 1994, the appellant executed a written waiver of his Miranda rights and provided law enforcement officers a complete statement of his involvement in the deaths of Charles Ragland and Erica Hurd and the aggravated rape

of Angela Ragland. See *supra*. Prior to trial, the appellant filed a motion to suppress this statement alleging that the statement was not knowingly and voluntarily given due to the fact that he was under the influence of crack cocaine. A hearing on the motion was heard on September 10, 1996.

The evidence at the suppression motion revealed that the appellant had been smoking crack cocaine on the evening of Friday, September 16, 1994. Russell Morris, the appellant's brother, verified that, when he saw the appellant at 5:30 p.m. that evening, the appellant had informed him that he had spent $200 on crack cocaine and was going to obtain more. He also testified that the appellant appeared to be intoxicated. Next, the defense attempted to call the victim, Angela Ragland, to the stand to testify regarding the appellant's appearance and actions during the commission of these offenses. The State objected on the basis that Angela Ragland was not "in any position to know anything about the condition that [the appellant] was in at the time that the statement was given." The trial court sustained the State's objection on the same ground, expressly finding that Ms. Ragland had no knowledge of the appellant's state of mind or whether he was under the influence of cocaine when he gave his statement some fourteen hours after he committed these offenses.

Dr. Robert Parker was called as an expert witness on the effects of crack cocaine on the human body. See *supra*. Specifically, Dr. Parker testified that mania was present during the "crash phase" when the appellant's statement was given. He explained that, during the "crash phase," one's judgment was impaired and usually was accompanied with confusion and suicidal thoughts. Moreover, "crash phase" symptoms could cause one not to care about or understand the consequences of their actions.

At the conclusion of Dr. Parker's testimony, the defense again attempted to introduce the testimony of Angela Ragland. However, the trial court refused to admit such testimony finding that "there's been no proof here presented, notwithstanding the use of cocaine, that he, because of the ingestion of cocaine, didn't understand what he was doing when he gave his statement. There's been no proof of that."[1]

The defense then offered to call the appellant to testify regarding "how [the drugs] affected his body, . . . the way he was . . . acting, how he was feeling about those things at the time he gave his statement and before that." Defense counsel asked the court to limit the examination of the appellant to these matters and to prohibit questioning as to the "facts of what happened on this alleged incident about the killings." The trial court refused this request, finding that there was no reason to prohibit the State from eliciting the

[1]At the conclusion of the appellant's proof, the trial court permitted defense counsel to make an offer of proof regarding the proffered testimony of Angela Ragland. Specifically, defense counsel stated that Angela Ragland would testify that she observed the appellant sweating and in an agitated state, talking and moving at a rapid pace, and looking for drugs when he came to her residence. Defense counsel contended that this testimony was corroborative of Dr. Parker's testimony regarding the effects of crack cocaine on a person.

contents of the statement on cross-examination and how it "reflects the truth of what occurred." Moreover, the trial court concluded that the appellant "can't exercise [his] Fifth Amendment privilege on examination of things which are relative to the things that he said . . . ." After this ruling, the defense elected not to call the appellant to the stand.[2]

The defense next called Officer James Golden to the stand. Officer Golden testified that he first encountered the appellant between 8:30 and 9:00 a.m. on the morning of September 17, 1994. At this time, the appellant "appeared normal to [him]." Later that afternoon, approximately 5:20 p.m., Golden, accompanied by Officer Willis, advised the appellant of his Miranda rights, witnessed the appellant waive these rights, and proceeded to obtain a confession from the appellant. Investigator Golden testified that, at the time the statement was obtained, the appellant did not appear to be under the influence of crack cocaine.

No further proof was presented. Based on this evidence, the trial court denied the appellant's motion to suppress. The trial court stated:

> . . . The basic premise here is that when he gave the statement, that statement was not the product of a free mind and rational intellect.
> . . .
> . . . The only proof that we have is from Officer Golden who said he was normal.
> . . .
> Now to adopt your idea, I would have to say that the rule of law is that you could prove that a person has had drugs. There's an inference that he didn't know - - that he couldn't give a rational statement. There is no such inference that's drawn from the proof that a person has used drugs that they can't give a good statement. You've got to first give me some proof that he didn't give a good statement.
> . . .
> . . . Well, what you've done is given me the corroborative proof, but you don't have any proof - - You have zero proof that the statement . . . was the product of an irrational mind. You have zero proof of that.

The appellant now contests the ruling of the trial court arguing (1) that the trial court erred in refusing to permit Angela Ragland to testify at the hearing and (2) that the testimony of Dr. Parker was sufficient to show that the appellant was in the "crash phase"

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[2]At this point at the suppression hearing, the defense did make an offer of proof relative to the appellant's anticipated testimony. Specifically, the proof would show that the appellant and Darryl Godwin purchased $250 worth of crack cocaine on September 16, 1994. Later that same day, the appellant purchased an additional $200-$250 worth of crack cocaine. The appellant consumed the entire amount of crack cocaine, with his cocaine binge ending at approximately 11:00 p.m. The appellant would further allege that he was in the "crash phase" at the time he gave his statement to the police.

of cocaine intoxication, suffering from impaired judgment, confusion, and suicidal thoughts, at the time his statement was given to the police.

Analysis

The trial court's determination that a confession has been given voluntarily and without coercion is binding upon the appellate court unless the evidence preponderates against the ruling. See State v. Odom, 928 S.W.2d 18, 22 (Tenn.1996); State v. Stephenson, 878 S.W.2d 530, 544 (Tenn.), reh'g denied, (1994). Under this standard, matters regarding the credibility of witnesses, the weight and value to be afforded the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial court as the trier of fact. Odom, 928 S.W.2d at 23. On appeal, the appellant bears the burden of demonstrating that the evidence preponderates against the trial court's findings. See State v. Tate, No. 02C01-9605-CR-00164 (Tenn. Crim. App. at Jackson, Dec. 3, 1997), perm. to appeal denied, (Tenn. Oct. 5, 1998) (citation omitted).

The law in this state is well-established that "[t]he ingestion of drugs and alcohol does not in and of itself render any subsequent confession involuntary." See State v. Robinson, 622 S.W.2d 62, 67 (Tenn. Crim. App. 1980), cert. denied, 454 U.S. 1096, 102 S.Ct. 667 (1981); see also State v. Beasley, No. 03C01-9509-CR-00268 (Tenn. Crim. App. at Knoxville, Oct. 10, 1996), reh'g denied, (Sept. 15, 1997), perm. to appeal denied, (Tenn. Apr. 27, 1998); State v. Teeters, No. 02C01-9304-CC-0051 (Tenn. Crim. App. at Jackson, Feb. 2, 1994). "It is only when an accused's faculties are so impaired that the confession cannot be considered the product of a free mind and rational intellect that it should be suppressed." Robinson, 622 S.W.2d at 67 (citing Lowe v. State, 584 S.W.2d 239 (Tenn. Crim. App. 1979)). The test to be applied in these cases is whether, at the time of the statement, the accused was capable of making a narrative of past events or of stating his own participation in the crime. Beasley, No. 03C01- 9509-CR-00268 (citations omitted).

In the present case, the defense presented the testimony of Officer Golden who stated that, at the time the appellant's statement was obtained, the appellant was acting normal, was calm, and did not appear to be under the influence of cocaine. He further testified that the appellant provided a complete narrative of the events surrounding the double homicides/aggravated rape. No proof was presented to rebut this observation other than the expert testimony of Dr. Parker whose testimony was limited to the general effects of cocaine intoxication and not those effects actually experienced by the appellant. Indeed, we find no proof that preponderates against the trial court's finding that the appellant made a voluntary and knowing statement to law enforcement officials.

Moreover, we conclude that the trial court properly prohibited the defense from calling Angela Ragland to the stand. Per the appellant's offer of proof, Angela Ragland would only have been able to testify about the appellant's state of mind and physical condition during the actual perpetration of the crimes, which was not at issue at the suppression hearing. There is no dispute that the appellant had ingested a large amount of crack cocaine the prior evening and was intoxicated at the time the crimes were

committed. However, Ms. Ragland was not present at the time the appellant's statement was given, some fourteen hours after the crimes occurred, and, therefore, could not testify regarding his demeanor during the police interview, *i.e.*, the issue at the suppression hearing. See Tenn. R. Evid. 402 and 602. Accordingly, the motion to suppress was properly denied. This issue is without merit.

II. Witherspoon Violations

The appellant next contends that the jury selection process in his capital trial violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). Specifically, he argues that the statements of two of the prospective jurors, Barbara Brooks and Dennis Spellings, concerning the death penalty did not justify their excusal for cause.

"The right to trial by jury secured by our state and federal constitutions necessarily contemplates that the jury will be unbiased and impartial." See Wolf v. Sundquist, 955 S.W.2d 626, 629 (Tenn. App.), perm. to appeal denied, (Tenn. 1997) (citing Thiel v. Southern Pacific Co., 328 U.S. 217, 220, 66 S.Ct. 984, 985 (1946); Ricketts v. Carter, 918 S.W.2d 419, 421 (Tenn. 1996); Durham v. State, 188 S.W.2d 555, 558 (Tenn. 1945)). "In its constitutional sense, impartiality envisions not only freedom from jury bias against the defendant but also freedom from jury bias in the defendant's favor." Id. (citing Swain v. Alabama, 380 U.S. 202, 219-20, 85 S.Ct. 824, 835 (1965); Hayes v. Missouri, 120 U.S. 68, 70-71, 7 S.Ct. 350, 351 (1887); Houston v. State, 593 S.W.2d 267, 272 (Tenn. 1980), rev'd on other grounds, State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992); Toombs v. State, 270 S.W.2d 649, 650 (Tenn. 1954)). Essentially, an impartial juror is one who is free from personal bias or prejudice and will find the facts and apply them to the law. See Wolf v. Sundquist, 955 S.W.2d at 629; see also Buchanan v. Kentucky, 483 U.S. 402, 417, 107 S.Ct. 2907, 2914 (1987); Wainwright v. Witt, 469 U.S. 412, 423, 105 S.Ct. 844, 851-52 (1985); Eason v. State, 65 Tenn. 466, 469 (1873).

To ensure an impartial jury, the Tennessee Supreme Court has adopted the rationale of the United States Supreme Court in determining the eligibility of prospective jurors in a capital case. In Witherspoon v. Illinois, the Supreme Court held that a prospective juror may be excluded for cause because of his or her views on capital punishment. This standard was clarified in Wainwright v. Witt, 469 U.S. at 424, 105 S.Ct. at 852:

> That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' We note that, in addition to dispensing with Witherspoon's reference to "automatic decision making," this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

See also State v. Alley, 776 S.W.2d 506 (Tenn. 1989), cert. denied, 493 U.S. 1036, 110 S.Ct 758 (1990); State v. Williams, 690 S.W.2d 517, 522 (Tenn. 1985). The Supreme Court also acknowledged that the questions asked and answered during the voir dire process do not always reveal a juror's bias with absolute certainty; "however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." See Wainwright v. Witt, 469 U.S. at 425- 26, 105 S.Ct. at 853. Therefore, "deference must be paid to the trial judge who sees and hears the juror." Id. Indeed, in State v. Alley, our supreme court held that "the trial court's finding of bias of a juror because of his views of capital punishment shall be accorded a presumption of correctness and the burden shall rest upon the appellant to establish by convincing evidence that determination was erroneous." Alley, 776 S.W.2d at 518; see also Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980).

A. Prospective Juror Brooks

During individual voir dire, Barbara Brooks was called as a potential juror. When asked by District Attorney General Woodall whether she could impose the death penalty in this case, Ms. Brooks responded that she could not do so for religious reasons. Despite further questioning by General Woodall, Ms. Brooks maintained that she did not believe in the death penalty and that she could not and would not impose such a sentence.

The trial court, as well, questioned Ms. Brooks regarding whether she could impose the death penalty. In response to the court's questioning, she again stated that she could not impose the death penalty no matter what the crime was because she does not "believe that a person's life should be taken because of it." She further admitted that "the death penalty is out of the question for [her]" and she would never consider imposing the death penalty on the appellant or anyone else.

Defense counsel, in an attempt to rehabilitate Ms. Brooks, asked her whether she could fairly consider the aggravating and mitigating circumstances and keep an open mind as to the three possibilities for sentencing in this case, to which Ms. Brooks responded affirmatively. The court again questioned Ms. Brooks as to whether she could impose the death penalty if it was called for by the law and the facts. Although Ms. Brooks responded that she could consider the sentence of life without the possibility of parole and that she could hear the evidence, she stated "I don't think I could be fair at that because of the death penalty . . . the only thing that hinders me is when you said death penalty. That's where it stops with me."

Despite this statement, defense counsel was again able to illicit answers from Ms. Brooks that raised concern as to her position on the death penalty. As a result, the trial court instructed Ms. Brooks to "just say how you feel." After further equivocation by the prospective juror, the trial court asked her point blank if the death penalty was out; she responded, "Forget it."

At that point, the State challenged Barbara Brooks for cause and the court sustained the challenge finding:

> . . . I finally put it to her as blank, I said, "The death penalty is out?" She said, "The death penalty is out, the death penalty is out. I will not impose it" and she said it multiple, multiple times.

Although Ms. Brooks' position on the death penalty was ambiguous at certain times during her voir dire examination, we can reach no rational conclusion other than finding that Ms. Brooks had a definite opposition to imposing the death penalty. Giving deference to the trial court who was able to observe this prospective juror, we conclude that the constitutional standard for excusing jurors due to their views on the death penalty was met.

B. Dennis Spellings

Later that same day, Dennis Spellings was called for individual voir dire. The following dialogue occurred between Mr. Spellings and General Woodall:

> GENERAL WOODALL: . . . Can you fairly consider the death penalty along with other forms of punishment?
>
> MR. SPELLINGS: That's a tough question.
>
> GENERAL WOODALL: As it should be. . . . [T]he law in the State of Tennessee is if the aggravating circumstances . . . outweigh the mitigating circumstances, you shall impose the death penalty. Can you do that or do you have personal convictions or religious convictions that would prevent you from doing it?
>
> MR. SPELLINGS: It's a tough question to ask straight forward. I really don't have an answer.
>
> . . .
>
> GENERAL WOODALL: Well, can you make that decision? Do you think that you could vote to impose the death penalty?
>
> MR. SPELLINGS: Honestly I don't.
>
> GENERAL WOODALL: Are you saying you don't think you could or maybe you could or you just don't know?
>
> MR. SPELLINGS: When we're talking about when push comes to shove, I don't know.
>
> GENERAL WOODALL: . . . So are you saying you don't know whether you could or you won't?

MR. SPELLINGS: I don't know.

Defense counsel also attempted to elicit a definite position from Mr. Spellings, but was unsuccessful. The trial court interrupted and asked Mr. Spellings, "After you hear all the proof, then you could make a decision as to whether or not death should apply?" Mr. Spellings responded, "I'll be honest with you. I'd rather not make that decision." During the court's discourse with Mr. Spellings, Mr. Spellings replied, at one point, that he could follow the law as instructed by the court, but later admitted that "he did not know" if he could follow the law as related to the death penalty.

The State challenged Mr. Spellings for cause, relying on Mr. Spellings admission that he did not know whether he would follow the law. The trial court sustained the challenge, explicitly finding:

> This is the first time we've run into this where a person just . . . won't answer the question or he feels like he can't answer the question. As I interpret the law that means that we have to get commitment from a juror that they would follow the law and that they would consider the death penalty under certain circumstances. I don't think that a juror is disqualified if they just continue to persistently say, "I don't know what I would do." That's like a juror who's really saying - - will you affirm to uphold the law and he would say, "Well, I just can't answer that." If you had a juror and you put him in the box and you say "Do you swear to tell the truth?" and he says, "I can't say whether I will or not," you wouldn't let him testify. It takes an affirmative statement by a juror that he would consider all the penalties. . . and would not exclude the death penalty as a possibility. I think the statements by this juror render him unqualified to served on the jury.

Again, this court gives deference to the decision of the trial court who was able to observe the prospective juror. The record demonstrates that Mr. Spellings could not state with certainty that he could perform his duties as a juror in accordance with his oath. Accordingly, the trial court properly excused this juror for cause. This issue is without merit.

(Deleted - III. Sufficiency of the Evidence)

IV. Statement of Intent of Future Wrongdoing and Prior Bad Act

Prior to the testimony of Angela Ragland, a jury-out hearing was held to determine the admissibility of testimony regarding the appellant's prior rape charge and statements made by the appellant to Angela Ragland regarding his intent to kill Marvin Eckford, to rob a bank, and to leave town. The trial court permitted the introduction of the testimony, finding that

> it would be rare that any statements made by any defendant during the course of a criminal enterprise to be excluded if there are crimes that require proof of culpability, state of mind, et cetera, they would usually be considered res gestae, so closely connected with the crime, with the offense, that they can't be separated from it. All of these statements reflect upon that, that he is on a killing spree, going to kill . . . that clearly is some proof of the defendant's mental state, that he was on a violent binge. You know, he commits one murder, he commits two murders, he might as well commit three, what-difference-does-it-make sort of attitude. It's also proof of, of course, the mental state. Words like, "I've been accused of one rape" . . . [w]ould serve as a motive. That's another thing, motive, intent, state of mind. . . . Certainly shows intent. . . that he knew what he had done. . . . Arguably evidence that the defendant was coherent, that he knew what he had done, he knew what he was going to do and that he had presence of mind about all of these things. . . . In summary, all of these remarks are clearly admissible. . . . But all of these things, particularly when you're thinking about the requirements of culpability being proven, when you're thinking about the position that's going to be taken . . . . Statements made during the course of the crime or even afterwards which would reflect upon the defendant's thinking, mental state, what he had on his mind, and all of these things do that. So they're going to be admissible for these numerous reasons, not to mention res gestae.

A. Statements of Future Intent

Again, during the guilt phase of the appellant's trial, the trial court permitted the State to question Angela Ragland about statements made to her by the appellant. On direct examination, Angela Ragland testified that, between instances of rape, the appellant told her that he was going home to tell his children goodbye, that he was going to kill Marvin Eckford because Eckford had provided his name to the woman accusing the appellant of raping her, and that he was going to rob a bank and leave town. On appeal, the appellant contends that such evidence is irrelevant and is unduly prejudicial.

The trial court correctly found such testimony admissible under the "state of mind" exception to the hearsay rule. See Tenn. R. Evid. 803(3); State v. Roe, No. 02C01-9702-CR-00054 (Tenn. Crim. App. at Jackson, Jan. 12, 1998); Neil P. Cohen et al., *Tennessee Law of Evidence* § 803(3).2 (3d ed. 1995). The testimony is relevant to show the appellant's existing state of mind at the time of the crimes, *i.e.*, to show his intent, plan, and motive, including the fact that he was capable of understanding the import of his actions. Id.; see also Tenn. R. Evid. 402. Moreover, the trial court instructed the jury that the appellant did not kill Marvin Eckford, did not rob a bank, and did not leave town. Accordingly, we cannot conclude that introduction of this evidence was more prejudicial than probative. See Tenn. R. Evid. 403. This issue is without merit.

B. Evidence of Prior Bad Act: Alleged Rape

Angela Ragland also testified that, during the crimes, the appellant told her that "[h]e had been accused of raping someone and that he didn't, and if he was going to go to jail, he was going to go to jail for doing something." The appellant objected and a jury-out hearing was held to conduct a Tenn. R. Evid. 404(b) analysis. The trial court found the testimony admissible, but determined that it should only be considered on the issue of mental intent. The trial court instructed the jury that "they're not to presume that he's guilty of any previous rape."

Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). Nonetheless, such evidence may be admissible for other purposes. Id. Other acts may be admitted to prove such issues as motive, intent, knowledge, absence of mistake or accident, common scheme or plan, identity, completion of the story, opportunity, and preparation. Neil P. Cohen et al., *Tennessee Law of Evidence* § 404.6. Thus, the trial court properly found that testimony concerning the alleged rape was admissible pursuant to Tenn. R. Evid. 404(b), as it was highly relevant to the issue of intent and its probative value outweighed the danger of unfair prejudice.

V. Photographs of Victim at Sentencing Phase

During the sentencing phase, the State was permitted, over objection, to introduce multiple photographs of the body of the deceased victim, Erica Hurd.[3] The trial court permitted the introduction of the photographs on the issue of establishing the aggravating circumstance "heinous, atrocious, or cruel." On appeal, the appellant complains that the admission of the photographs was error. Specifically, he argues that (1) the photographs were more prejudicial than probative and (2) the photographs were cumulative to the testimony of Dr. Smith and the demonstrative evidence of the mannequin.

Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). Accordingly, "the admissibility of photographs lies within the discretion of the trial court" whose ruling "will not be overturned on appeal except upon a clear showing of an abuse of discretion." Id. However, before a photograph may be admitted into evidence, it must be relevant to an issue that the jury must decide and the probative value of the photograph must outweigh any prejudicial effect that it may have upon the trier of fact. See

[3]The State also sought to introduce photographs of Charles Ragland. The trial court refused to admit these photographs into evidence. The State later voluntary withdrew these photographs.

State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993) (citation omitted); see also Tenn. R. Evid. 401 and 403.

Of the ten photographs contested on appeal, two are of the victim at the crime scene and the remaining are photographs from the autopsy. Eight of the ten photographs depict wounds to the victim's face and neck. The appellant contends that the facial pictures are unduly prejudicial in that they are "gruesome and inflammatory" and the "facial expression on the victim's face . . . could produce a terrible reaction in the jury." The appellant argues that the introduction of the photographs was unnecessary and cumulative due to the testimony of Dr. Smith describing the wounds and his use of a mannequin to demonstrate the various points of injury. The trial court permitted the photographs of Erica Hurd into evidence, finding that "[g]ruesome pictures are admissible in these situations if it would tend to show some of these factors that are involved in the heinous, atrocious or cruel category, torture, physical abuse."

Although we concede that the photographs are not pleasant to view, they accurately depict the nature and the extent of the victim's injuries. There is no dispute that the photographs were introduced to prove the aggravating circumstance of "heinous, atrocious, or cruel." This evidence was relevant to support the State's proof of the "heinous, atrocious, and cruel" aggravating circumstance. See, e.g., State v. Hall, 976 S.W.2d 121, 162 (Tenn. 1998); State v. Smith, 893 S.W.2d 908, 924 (Tenn. 1994), cert. denied, 516 U.S. 829, 116 S.Ct. 99 (1995); State v. Smith, 868 S.W.2d 561, 579 (Tenn. 1993), cert. denied, 513 U.S. 960, 115 S.Ct. 417 (1994) (citing State v. Payne, 791 S.W.2d 10, 19-20 (Tenn. 1990), judgment aff'd by, 501 U.S. 808, 111 S.Ct. 2597 (1991); State v. Miller, 771 S.W.2d 401, 403-404 (Tenn. 1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3292 (1990); State v. Porterfield, 746 S.W.2d 441, 449-450 (Tenn.), cert. denied, 486 U.S. 1017, 108 S.Ct. 1756 (1988); State v. McNish, 727 S.W.2d 490, 494-495 (Tenn.), cert. denied, 484 U.S. 873, 108 S.Ct. 210 (1987)).

Notwithstanding, as a general rule, where medical testimony adequately describes the degree or extent of the injury, gruesome and graphic photographs should not be admitted. See State v. Duncan, 698 S.W.2d 63 (Tenn. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240 (1986). The photographs were used by the physician who performed the autopsy to assist in explaining his testimony about the manner and cause of death. The photographs clarify the complex testimony of Dr. Smith regarding the severity of the injuries. See Stephenson, 878 S.W.2d at 542; Smith, 868 S.W.2d at 576 (photographs used to illustrate witnesses' testimony admissible for this purpose). Moreover, a relevant photograph is not rendered inadmissible merely because it is cumulative. See State v. Bigbee, 885 S.W.2d 797, 807 (Tenn. 1994); Van Tran, 864 S.W.2d at 477.

We conclude that the photographs were not especially gruesome or shocking in nature so as to preclude their admission. Although any such photographs would be prejudicial to the appellant's case, the photographs introduced at the sentencing hearing were highly probative in determining an aggravating circumstance. We cannot conclude that the trial court abused its discretion by admitting these photographs during the

sentencing process. See Tenn. R. Evid. 403; State v. Evans, 838 S.W.2d 185 (Tenn. 1992); Banks, 564 S.W.2d at 947. See also State v. Brown, 756 S.W.2d 700, 704 (Tenn. Crim. App.1988); Freshwater v. State, 453 S.W.2d 446, 451-52 (Tenn. 1969); State v. Beckman, No. 02C01-9406-CR-00107 (Tenn. Crim. App. at Jackson, Sept. 27, 1995), perm. to appeal granted, (Tenn. July 8, 1996), perm. to appeal denied, (Tenn. Sept. 9, 1996). This issue is without merit.

VI. Victim Impact Evidence

During closing argument during the penalty phase, General Woodall made the following statements:

> It's up. We know for sure that Erica is now gone, at peace and out of pain. There's a lot of other pain here and that's the families of these victims. That's what Angela Ragland went through and will have to go through and there are just not any mitigating circumstances that outweigh these aggravating circumstances, absolutely none. That's why we have this law and where the aggravating circumstances do not (sic) outweigh the mitigating circumstances, the punishment shall be death.

The appellant objects to this argument; contending that this statement constitutes victim impact evidence which is inadmissible, irrelevant to any aggravating or mitigating circumstance, and constitutes argument of matters not in evidence.[4] Additionally, he asserts that the inflammatory argument posed a substantial risk that the death penalty was imposed arbitrarily, jeopardizing the reliability requirements of the Eighth Amendment.

The issues raised by the appellant herein were recently addressed in detail by our supreme court in State v. Nesbit, No. 02S01-9705-CR-00043 (Tenn. at Jackson, Sept. 28, 1998) (*for publication*). In a thorough review of the case law development of the admissibility of victim impact evidence, the supreme court reached several conclusions on the issue.

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[4]As correctly noted by the State and conceded by the appellant, the appellant failed to make a contemporaneous objection to the prosecutor's statements resulting in waiver of this issue. Tenn. R. Crim. P. 52(a); see State v. Renner, 912 S.W.2d 701, 705 (Tenn. 1995); Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App.1988), cert. denied, 493 U.S. 874, 110 S.Ct. 210 (1989); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App.1988). Due to the qualitative differences between death and other sentences, the appellate courts of this state consider issues occurring during the sentencing hearing in a capital case. See Bigbee, 885 S.W.2d at 805 ; Duncan, 698 S.W.2d at 67-68; State v. Strouth, 620 S.W.2d 467, 471 (Tenn. 1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1491 (1982). Thus, notwithstanding waiver of this claim, this court elects to consider this issue on the merits.

First, noting prior decisions of the United States Supreme Court and its own precedent, the court held that "victim impact evidence and argument is [not] barred by the federal and state constitutions." Nesbit, No. 02S01-9705-CR-00043. See also Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597,2609 (1991) (holding that the Eight Amendment erects no *per se* bar against the admission of victim impact evidence and prosecutorial argument); State v. Shepherd, 902 S.W.2d 895, 907 (Tenn. 1995) (holding that victim impact evidence and prosecutorial argument is not precluded by the Tennessee Constitution); State v. Brimmer, 876 S.W.2d 75, 86 (Tenn.), cert. denied, 513 U.S. 1020, 115 S.Ct. 585 (1994) (same). Thus, the appellant's argument challenging the constitutionality of the admissibility of victim impact evidence and argument under the Eighth Amendment has been precluded by the Tennessee Supreme Court.

Additionally, the court addressed the relevancy of argument and evidence regarding the impact of the crime(s) on the victim's family. The court noted that, although "[Tenn. Code Ann. § 39-13-204(c)] . . .permits admission of all relevant mitigating evidence, whether or not the category of mitigation is listed in the statutory scheme,"[5] "this Court repeatedly has held that the State may not rely upon nonstatutory aggravating circumstances to support imposition of the death penalty." Nesbit, No. 02S01-9705-CR-00043 (citing State v. Thompson, 768 S.W.2d 239, 251 (Tenn. 1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3288 (1990); State v. Cozzolino, 584 S.W.2d 765, 768 (Tenn. 1979)). Notwithstanding, the court stated that, "in several subsequent decisions we have expressly recognized that a sentencing jury must be permitted to hear evidence about the *nature and circumstances of the crime* even though the proof is not necessarily related to a statutory aggravating circumstance." Nesbit, No. 02S01-9705-CR-00043 (citing State v. Harris, 919 S.W.2d 323, 331 (Tenn. 1996); State v. Teague, 897 S.W.2d 248, 251 (Tenn. 1995); Bigbee, 885 S.W.2d at 813; State v. Nichols, 877 S.W.2d 722, 731 (Tenn. 1994), cert. denied, 513 U.S. 1114, 115 S.Ct. 909 (1995)). (Emphasis in original). Accordingly, the court concluded that "the impact of the crime on the victim's immediate family is one of those myriad factors encompassed within the statutory language *nature and circumstances of the crime*." Id. (emphasis in original).

In so holding, the court reasoned:

> The Tennessee statute delineates a procedure which enables the sentencing jury to be informed about the presence of statutory aggravating circumstances, the presence of mitigating circumstances, and the nature and circumstances of the crime. The statute allows the sentencing jury to be reminded 'that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' Payne, 501 U.S. at 825, 111 S.Ct. at 2608

[5] See Nesbit, No. 02S01-9705-CR-00043 (citing Cazes, 875 S.W.2d at 266 (discussing McKoy v. North Carolina, 494 U.S. 433, 442, 110 S.Ct. 1227, 1233 (1990) and Mills v. Maryland, 486 U.S. 367, 375, 108 S.Ct. 1860, 1865-66 (1988))).

> (internal citations and quotations omitted). As this Court emphasized in its decision in Payne, it would be 'an affront to the civilized members of the human race' to allow unlimited mitigation proof at sentencing in a capital case, but completely preclude proof of the specific harm resulting from the homicide. Accordingly, the defendant's claim that victim impact evidence is not admissible under the Tennessee capital sentencing statute is without merit.

Nesbit, No. 02S01-9705-CR-00043.

The supreme court, however, limited this ruling, by holding that "victim impact evidence may [not] be introduced 'that is so unduly prejudicial that it renders the trial fundamentally unfair,' thus implicating the Due Process Clause of the Fourteenth Amendment." Id. (citing Payne, 501 U.S. at 825, 111 S.Ct. at 2608). Moreover, the trial court, in its discretion, "may exclude victim impact proof if its probative value is substantially outweighed by its prejudicial effect." Id. (citing Tenn. R. Evid. 403). Indeed, "victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family." Id. (internal citations omitted) (citing Payne, 501 U.S. at 822, 111 S.Ct. at 2607; Payne, 501 U.S. at 803, 111 S.Ct. at 2611 (O'Connor, J., concurring); Cargle v. State, 909 P.2d 806, 826 (Ok. Ct. Crim. App. 1995)). Similarly, the court "cautioned the State against engaging in victim impact argument which is little more than an appeal to the emotions of the jurors as such argument may be unduly prejudicial." Id. (citing Shepherd, 902 S.W.2d at 907 (parenthetical omitted); Bigbee, 885 S.W.2d at 808 (parenthetical omitted)).

In the present case, the victim impact argument, in essence, is limited to "[t]hat's what Angela Ragland went through and will have to go through." It would be farfetched to conclude that this statement prejudiced the outcome of the sentencing phase as the effects of the double homicide on Angela Ragland were directly fashioned by the appellant and were clearly foreseeable. See Payne v. Tennessee, 501 U.S. at 838, 111 S.Ct. at 2615-2616 (Souter, J., concurring). Indeed, the fact that the death of a loved one is devasting requires no proof. Accordingly, the challenged argument was properly admitted.[6] This issue is without merit.

VII. Separate Jury for Penalty Phase

[6]Although not applicable to the present case as the murders occurred prior to the supreme court's decision in Nesbit, we note that the supreme court established procedures under which victim impact evidence may be introduced during capital sentencing phases. See Nesbit, No. 02S01-9705-CR-00043.

The appellant claims that a separate jury should have been impaneled for the penalty phase of his trial. He asserts that, by requiring the same jury to hear both the guilt and penalty phases of his capital trial, he was deprived of his right to a fair and impartial jury under the Tennessee and United States Constitutions. Specifically, he contends that "he was denied a cross-section of the community because those jurors that could not enforce the death penalty were removed and he got a jury that was prone to give the death penalty."

This argument has been previously considered and rejected by our supreme court. In State v. Harbison, 704 S.W.2d 314, 318-319 (Tenn. 1986), cert. denied, 476 U.S. 1153, 106 S.Ct. 2261 (1986), the court rejected a claim by the defendant that separate juries should have been sworn to hear the guilt and sentencing phases of the trial and held that a single jury in a capital case neither denied a fair cross section of the community nor resulted in a conviction prone process. See also State v. Teel, 793 S.W.2d 236, 246 (Tenn.), cert. denied, 498 U.S. 1007, 111 S.Ct. 571 (1990) (guilt prone jury argument "has been rejected by both the Tennessee and United States Supreme Courts"); State v. Jones, 789 S.W.2d 545, 547 (Tenn.), cert. denied, 498 U.S. 908, 111 S.Ct. 280 (1990) (rejecting guilt prone jury claim); State v. Zagorski, 701 S.W.2d 808, 814-15 (Tenn. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3309 (1986) (rejecting cross section claim);. This issue is without merit.[7]

VIII. Constitutional Challenges

Finally, the appellant raises a myriad of challenges to the constitutionality of Tennessee's death penalty provisions. The appellant concedes that these issues have been previously rejected by the Tennessee Supreme Court, however, he raises these challenges to preserve them for future appellate review.

A. Death by Electrocution

The appellant first contends that "[t]he electric chair constitutes cruel and unusual punishment," emphasizing that "the Eighth Amendment forbids inhuman and barbarous methods of execution that go beyond the mere extinguishment of life and cause torture or a lingering death." (citing Glass v. Louisiana, 471 U.S. 1080, 105 S.Ct. 2159 (1985)). As support for his argument, the appellant refers to recent legislation in this state moving beyond death by electrocution and substituting lethal injection. See Tenn. Code Ann. § 40-23-114 (1998 Supp.) (changes the method of execution from electrocution to lethal

[7]Additionally, we note that Tennessee's statutory scheme for first degree murder mandates that the "same jury that determined guilt" "shall fix the punishment in a separate sentencing hearing." See Tenn. Code Ann. § 39-13-204(a) (1994 Supp.).

injection for those persons sentenced to death after January 1, 1999).[8] We do not see how this amendment renders death by electrocution unconstitutional. The appellate courts of this state are of the opinion that electrocution is a constitutionally permissible method of execution and have routinely rejected this argument. See Black, 815 S.W.2d at 179; see also Hines, 919 S.W.2d at 582.

B. Death penalty is cruel and unusual punishment.

Within this challenge, the appellant makes numerous challenges alleging that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 8, 9, 16, and, 17, and Article II, Section 2 of the Tennessee Constitution. These arguments have previously been rejected by our supreme court:

1. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants, specifically because Tenn. Code Ann. § 39-13-204 (i)(4), (5), (6), and (7) encompass a majority of the homicides committed in Tennessee,[9] have been rejected by our supreme court. See State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994).

2. The death sentence is imposed capriciously and arbitrarily in that:

(1) Unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty. This argument has been rejected. See Hines, 919 S.W.2d at 582.

(2) The death penalty is imposed in a discriminatory manner based upon economics, race, geography, and gender. This argument has been rejected. See Hines, 919 S.W.2d at 582; Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 23 (Tenn.), cert. denied, 510 U.S. 996, 114 S.Ct. 561 (1993).

(3) There are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter. This argument has been rejected. See State v. Caughron, 855 S.W.2d 526, 542 (Tenn.), cert. denied, 510 U.S. 979, 114 S.Ct. 475 (1993).

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[8]The bill also provides that those persons sentenced to death prior to January 1, 1999, may choose to be executed by lethal injection by signing a written waiver. See Constitutionality of House Bill 2085 as amended -- Change in Method of Execution, Tenn. Op. Atty. Gen. No. 98-074 (Mar. 31, 1998); Constitutionality of House Bill 2085 -- Change in Method of Execution, Tenn. Op. Atty. Gen. No. 98-068 (Mar. 25, 1998).

[9]We note that factors (i)(4) and (i)(6) do not pertain to this case as they were not relied upon by the State. Thus, any individual claim with respect to these factors is without merit. See, e.g., Hall, 958 S.W.2d at 715; Brimmer, 876 S.W.2d at 87.

(4) The death qualification process skews the make-up of the jury and results in a relatively prosecution prone guilt-prone jury. This argument has been rejected. See Teel, 793 S.W.2d at 246; Harbison, 704 S.W.2d at 318.

(5) Defendants are prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, *i.e.*, the cost of incarceration versus cost of execution, deterrence, method of execution. This argument has been rejected. See Brimmer, 876 S.W.2d at 86-87; Cazes, 875 S.W.2d at 268; Black, 815 S.W.2d at 179.

(6) The jury is instructed that it must agree unanimously in order to impose a life sentence, and is prohibited from being told the effect of a non-unanimous verdict. This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; Smith, 857 S.W.2d 22-23.

(7) Requiring the jury to agree unanimously to a life verdict violates Mills v. Maryland and McKoy v. North Carolina. This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Thompson, 768 S.W.2d at 250; State v. King, 718 S.W.2d 241, 249 (Tenn. 1986), *superseded by statute as recognized by*, State v. Hutchinson, 898 S.W.2d 161 (Tenn. 1994).

(8) The jury is not required to make the ultimate determination that death is the appropriate penalty. This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Smith, 857 S.W.2d at 22.

(9) The defendant is denied final closing argument in the penalty phase of the trial. This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 24; Caughron, 855 S.W.2d at 542.

3. Appellate Review process in death penalty cases is constitutionally inadequate.

The defendant argues that the appellate review process in death penalty cases is constitutionally inadequate in its application. He contends that the appellate review process is not constitutionally meaningful because the appellate courts cannot reweigh proof due to the absence of written findings concerning mitigating circumstances, because the information relied upon by the appellate courts for comparative review is inadequate and incomplete, and because the appellate courts' methodology of review is flawed. This argument has been specifically rejected by our supreme court on numerous occasions. See Cazes, 875 S.W.2d at 270-71; see also Harris, 839 S.W.2d at 77; Barber, 753 S.W.2d at 664. Moreover, the supreme court has recently held that, "while important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required." Bland, 958 S.W.2d at 663.

(Deleted: XII. Proportionality Review)

Conclusion

In accordance with the mandate of Tenn. Code Ann. § 39-13-206(c)(1) and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find that the sentence of death was not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstances, and the jury's finding that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-206 (c)(1)(A)-(C). A comparative proportionality review, considering both the circumstances of the crime and the nature of the appellant, convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Likewise, we have considered the appellant's assignments of error as to each of his convictions on appeal and the respective sentences and determined that none have merit. Additionally, we conclude, in reference to the murder of Charles Ragland, that the jury appropriately found two statutory aggravating circumstances and did not arbitrarily impose a sentence of life without the possibility of parole as to that count. Thus, we affirm the appellant's conviction for the first degree murder of Charles Ragland and the accompanying sentence of life without the possibility of parole, his conviction for the first degree murder of Erica Hurd and the accompanying sentence of death by electrocution, and his conviction for the aggravated rape of Angela Ragland and the accompanying sentence of twenty-five years.[10]

_____
DAVID G. HAYES, Judge

CONCUR:

_____
JOE G. RILEY, Judge

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JOHN EVERETT WILLIAMS, Judge

[10]No execution date is set. Tenn. Code Ann. § 39-13-206(a)(1) provides for automatic review by the Tennessee Supreme Court upon affirmance of the death penalty. If the death sentence is upheld by the higher court on review, the supreme court will set the execution date.